

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL S. LEWIS,	§
	§
Defendant Below-	§ No. 305, 2010
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID 0706015657
Plaintiff Below-	§
Appellee.	§

Submitted: August 17, 2010

Decided: October 25, 2010

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

ORDER

This 25th day of October 2010, upon consideration of appellant's opening brief and the State's motion to affirm, it appears to the Court that:

(1) The appellant, Michael Lewis, filed this appeal from the Superior Court's denial of his motion for correction of illegal sentence. The State has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Lewis' opening brief that his appeal is without merit. We agree and affirm.

(2) The record reflects that Lewis pled guilty in February 2008 to one count each of delivery of a controlled substance, maintaining a vehicle for keeping a controlled substance, and aggravated menacing. The Superior

Court sentenced Lewis in April 2008 as follows: (a) on the delivery charge, five years at Level V incarceration to be suspended after serving two years and upon successful completion of the GreenTree program for one year at Level IV residential drug treatment, to be suspended upon successful completion of Level IV for eighteen months at Level III aftercare; (b) on the aggravated menacing charge, five years at Level V to be suspended immediately for two years at Level III aftercare; and (c) on the maintaining a vehicle charge, three years at Level V to be suspended immediately for eighteen months at Level III aftercare.

(3) In April 2009, the Department of Correction informed the Superior Court that Lewis had been dismissed from the GreenTree program because of disorderly and threatening conduct. The program director told the Superior Court that a mental health evaluator had concluded that GreenTree might be too rigorous a program for Lewis and recommended that Lewis be considered for the Key Program. As a result of that report, the Superior Court ordered that Lewis be admitted to the Delaware Psychiatric Center for an extended evaluation and treatment. Thereafter, the Superior Court scheduled a sentence review and ordered that counsel appear at the hearing on behalf of both Lewis and the State.

(4) The hearing was held on November 12, 2009. Counsel appeared for both parties. In discussing the DPC report, the Superior Court noted that, in the four months that Lewis had spent at DPC for the treatment evaluation, Lewis had been defiant, disruptive, and uncooperative with his treatment. He had threatened harm to himself and to others and had been both verbally and physically assaultive. The DPC diagnosed Lewis with a personality disorder that made him unsuitable for psychiatric hospitalization. Based on his past behaviors and his disorders, the DPC expert opined that Lewis was unlikely to cooperate with any programming that might benefit him, and recommended that Lewis be returned to the Department of Correction. Despite the DPC's report, defense counsel requested that Lewis be released to Level IV home confinement with community treatment. The State, however, requested that Lewis be ordered to remain at Level V incarceration.

(5) After considering the parties' positions and the DPC evaluation, the Superior Court resentenced Lewis, effective April 4, 2008, as follows: on the delivery charge, five years at Level V incarceration; on the aggravated menacing charge, five years at Level V with credit for one day previously served; and on the charge of maintaining a vehicle, three years at Level V incarceration to be suspended upon completion of the GreenTree program

for Level III. Lewis did not appeal from the Superior Court's modified sentence. Instead, on March 9, 2010, he moved for correction of illegal sentence, which the Superior Court denied. Lewis filed a second motion for correction of illegal sentence on May 5, 2010. Lewis now appeals the Superior Court's denial of that motion.

(6) In his opening brief on appeal, Lewis claims that his original sentence was the result of a plea bargain he reached with the State and that the Superior Court's amended sentence violated that agreement. Lewis also claims that the Superior Court erred in revoking his probationary sentences and imposing Level V time, because he had not yet begun to serve his probationary sentences. Lewis contends that that constitutes a violation of the Double Jeopardy clause.

(7) We find no merit to Lewis' arguments. A defendant's sentence of probation may be revoked at any time, even before its commencement.¹ Lewis's misconduct at Level V resulted in his inability to serve the sentence originally imposed by the Superior Court. In determining how Lewis' sentence should be modified, the Superior Court ordered an extended mental health evaluation of Lewis and held a hearing on the matter. The Superior Court's conclusion that Level V incarceration was appropriate is wholly

¹ *Williams v. State*, 560 A.2d 1012, 1015 (Del. 1989).

supported by the record. The modified sentence did not exceed the Level V time remaining to be served on the original sentence.² Moreover, despite Lewis' contention to the contrary, the modified sentence did not violate double jeopardy principles because Lewis was credited with all of the Level V time that he already had served on the original sentence.³ Accordingly, we find no error in the Superior Court's denial of Lewis' motion for correction of sentence.⁴

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

² See 11 Del. C. § 4334(c).

³ *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999).

⁴ *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998).